

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. 2003-0686, State of NH v. Miguel A. Ortiz, Jr., the court on December 22, 2004, issued the following order:**

Following a jury trial, the defendant was convicted on two counts of sale of a controlled drug. On appeal, he contends that the trial court erred in: (1) excluding a defense witness; (2) admitting evidence underlying a nol prossed indictment during the sentencing hearing; (3) denying the defendant's motion for a directed verdict; (4) refusing to give a jury nullification instruction; and (5) instructing the jury. We affirm.

On the day after jury selection, the defendant disclosed to the State for the first time that he wanted to call an exculpatory witness. No explanation was offered for the delay in disclosure, the witness failed to appear for a meeting with the State and the trial court found that to allow him to testify would be prejudicial. We find no error in the trial court's ruling. See State v. Belton, 150 N.H. 741, 745 (2004) (discovery sanction imposed by trial court reviewed under unsustainable exercise of discretion standard). To the extent the defendant argues that the trial court failed to consider the factors we set forth in State v. Cromlish, 146 N.H. 277 (2001), in making its determination, he failed to raise this issue in the trial court and it has therefore not been preserved. See State v. Gordon, 147 N.H. 576, 578 (2002).

We next consider the defendant's argument concerning the nol prossed indictment. Although the State filed a notice of its intent to seek enhanced penalties, it did not seek them at the sentencing hearing and the sentence imposed was less than requested by the State. Having reviewed the record, we find no merit in the defendant's argument. See State v. Tufts, 136 N.H. 517, 519 (1992) (presentence reports may refer to criminal charges not resulting in conviction).

We similarly find no merit in the defendant's contention that the trial court erred in denying his request for a directed verdict based upon insufficient identification evidence. The arresting officer testified that he had seen the defendant in two meetings, they shook hands at one of the meetings, and he pointed him out in court. See State v. King, 151 N.H. 59, 61 (2004) (to prevail on sufficiency of evidence claim, defendant bears burden of proving that no rational trier of fact considering evidence in light most favorable to State could have found guilt beyond a reasonable doubt).

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It is within the trial court's discretion to decide whether a jury nullification charge should be given. State v. Paris, 137 N.H. 322, 332 (1993). Moreover, as we stated in Paris, the trial court gave the equivalent of a nullification instruction when it used the word "should" in its instruction. Id. at 333.

Even if we assume without deciding that the newly-adopted plain error rule would apply to this appeal so as to permit review of the defendant's final argument, we find it has no merit. See State v. Lamprey, 149 N.H. 364, 366 (2003) (allegations of error in jury instructions evaluated by reviewing instructions in their entirety as reasonable juror would have understood them and in light of all evidence in the case).

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,  
Clerk**

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